

October 24, 2018

Via Electronic Mail (rule-comments@sec.gov)

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

RE: Roundtable on Market Data and Market Access, File No. 4-729

Dear Mr. Fields:

TD Ameritrade, Inc.¹ (“TD Ameritrade” or “the Firm”) appreciates the opportunity to provide comments concerning the U.S. Securities and Exchange Commission’s (“Commission”) Market Data Roundtable. TD Ameritrade has been invited to participate in the Commission’s upcoming Roundtable panel – “SIP Core Data Products and Exchange Top-Of-Book Data Products.” As a result, our comments will focus on this subject.

As a broker providing 11 million client accounts access to the U.S markets, TD Ameritrade’s goal is to deliver a consistent, quality market data experience by providing clients trading tools and platforms utilizing a mix of consolidated top-of-book and depth of book data. TD Ameritrade’s clients are primarily self-directed retail investors representing a diverse community of individuals with different trading and investment needs. TD Ameritrade provides consolidated top-of-book data across all of our platforms. In fact, TD Ameritrade is one of the largest redistributors of market data provided through the securities information processors (“SIPs”). Given our business model of making SIP consolidated data widely available to the individual investor, the Firm believes it provides a unique perspective concerning the strengths and weaknesses of the SIPs as compared to other exchange proprietary top-of-book offerings.

TD Ameritrade has long supported reformation of market data structure that permits retail investors equal access to real-time, low-cost market data.² To this end, TD Ameritrade applauds the

¹ TD Ameritrade is a wholly owned broker subsidiary of TD Ameritrade Holding Corporation (“AMTD”). AMTD has a 43-year history of providing financial services to self-directed investors. TD Ameritrade provides investing and trading services to over 11 million client accounts that total more than \$1.2 trillion in assets, and custodial services for more than 6000 independent registered investment advisors. During fiscal year 2018, TD Ameritrade’s clients placed on average 811,000 trades per day.

² “Public Access to Market Data: Improving Transparency and Competition,” U.S. House of Representatives, Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, Committee on Financial Services, Testimony of Randy MacDonald, Chief Financial Officer, Ameritrade Holding Corporation (Mar. 14, 2001) <http://commdocs.house.gov/committees/bank/hba71311.000/hba71311_of.htm>; and Letter to Elizabeth Murphy, Secretary, Commission, “TD Ameritrade Petition for Rulemaking Regarding Market Data,” (Jan. 28, 2011) <<https://www.sec.gov/rules/petitions/2011/petn4-623.pdf>>.

Commission's recent focus on ensuring that market data access is in "the best interests of the markets and our Main Street investors."³

Providing quality market data to millions of retail investors is costly. Moreover, the current SIP Plan policies and requirements for making SIP data available to retail investors have evolved into a process with significant administrative burdens and hidden costs that are borne both by brokers and retail investors.

As for SIP consolidated data versus proprietary top-of-book data, there is evidence that SIP data is seemingly mispriced. In fact, it would be significantly cheaper for a retail broker to purchase an exchange top-of-book data solution to display to clients compared to the cost of SIP enterprise licenses.

Finally, although TD Ameritrade is encouraged by increased transparency of SIP plan revenues, there is great room for improved transparency and governance of the SIP Plans.

Background – Original Vision

On July 18, 1983, the participants in both the Consolidated Quotation Plan ("CQ Plan") and the Consolidated Tape Association ("CTA Plan") submitted to the Commission, pursuant to Rule 11Aa3-2 under the Securities Exchange Act of 1934, amendments to the CQ⁴ and CTA⁵ Plans governing the operation of the consolidated quotation and consolidated transaction systems.⁶ The amendment

³ See Chairman Jay Clayton's, "Statement on Market Data Fees and Market Structure," Oct. 16, 2018 <<https://www.sec.gov/news/public-statement/statement-chairman-clayton-2018-10-16>>. See also *In the Matter of the Application of SIFMA*, Rel. No. 34-84432 (Oct. 16, 2018); and *In the Matter of the Application of SIMFA and Bloomberg*, Rel. No. 34-84433 (Oct. 16, 2018).

⁴ Receipt and Temporary Summary Effectiveness of an Amendment to Establish Non-Professional fees: Consolidated Quotation Plan, Rel. No. 34-20001; File No. 4-281 (July 22, 1983), 48 FR 34551 (July 29, 1983).

⁵ Receipt and Temporary Summary Effectiveness of an Amendment To Establish Nonprofessional Fees; Consolidated Tape Association, Rel. No. 34-20002; File No. S7-433 (July 22, 1983), 48 FR 34552 (July 29, 1983).

⁶ The SIPs link the U.S. markets by processing and consolidating all protected equities bid/ask quotes and trades from every registered exchange and FINRA's Alternative Display Facility ("ADF") into a single, easily consumable data feed. Although often referred to in the singular, there are actually two SIPs: the combined CTA ("Consolidated Tape Association") and CQ ("Consolidated Quotation System") SIP, and the UTP ("Unlisted Trading Privileges") SIP. The CTA/CQ SIP is responsible for the dissemination of real-time quote and trade information in NYSE-listed securities (sometimes called "Network A" or "Tape A" securities) and Cboe, NYSE Arca, NYSE American and other regional exchange listed securities (sometimes called "Network B" or "Tape B" securities). The UTP SIP handles Nasdaq listed securities (sometimes called "Network C" or "Tape C" securities). Each SIP is governed by a Plan and run by an Operating Committee ("OC") comprised of its Plan Participants. The OCs are counseled by an eleven member Advisory Committee made up of individuals representing firms from across the industry and representing the diverse viewpoints of the market. <https://globenewswire.com/news-release/2018/07/17/1538174/0/en/SIP-Operating-Committees-Welcome-Three-New-Advisory-Committee-Members.html>.

established low monthly fees that permitted small investors, for the first time, to receive quotation information relating to listed securities on a real-time basis. It was heralded at the time as a way to lower the cost of market information to the public investor, and thus “enable vendors using various newly developing services aimed at the individual investor, such as videotext cable television, telephone inquiry devices, personal computers, and pocket sized radio receivers, to offer current market information to a broader range of investors than ever before.”⁷ The language contained within the Plan Amendments was concise, simple and unambiguous:

The classification of “non-professional” will be governed by guidelines adopted by the CTA; generally, however, the “non-professional” category is intended to apply to individual investors not using market information as part of their normal occupation.⁸

The criteria to whom this newly created “non-professional” classification would apply was initially a straightforward one. The classification of an individual investor was based solely upon whether or not the market information would be used as part of an individual investor’s “normal occupation.” What began as a simple concept morphed over time into a panoply of policies and interpretations that became less and less reflective of the original intent that drove its implementation in the first place.⁹

The Cost Burden of Providing SIP Consolidated Data to Retail Investors

Shifting Plan policies and interpretations have created confusion among retail investors, as well as an increasing administrative burden on the retail brokers that serve them. The efforts to harmonize the Tape Plan policies in the last few years have fallen short. While those efforts have seen limited success, particularly around the adoption of aligned language in the nonprofessional qualification requirements, significant differences still exist in policy between CTA and UTP, such as the areas of unit of count basis (usage or entitlement),¹⁰ reporting dates and deadlines,¹¹ professional user capping,¹²

⁷ Rel. No. 34-20001, 48 FR at 34552; Rel. No. 34-20002, 48 FR at 34553.

⁸ Rel. No. 34-20001, 48 FR at 34551 at n.2; Rel. No. 34-20002, 48 FR at 34552 at n.2.

⁹ Both CTA and UTP Plans have been amended frequently – the CTA plan has been amended 24 times since its Second Restatement in 1996, and the UTP Plan has been amended 42 times since its initial approval was granted by the Commission in 1982.

¹⁰ Under CTA policy, if a professional user is not reported to NYSE on a per query basis, then they must be reported on a per user basis based upon whether they had entitlement to access real-time Tape A and/or B consolidated quote data in a given month. By comparison, under UTP Policy, a professional user must be reported only if they received real-time consolidated Tape C data in a given month, irrespective of entitlement.

¹¹ NYSE requires that prior month CTA Reporting be provided to it no later than the last business day of the following month, whereas Nasdaq requires that prior month UTP reporting be provided by the 15th day of the following month.

¹² Unlike UTP policy, CTA policy does not allow for a professional user who is reported on a per query basis to be capped at the cost of the per user monthly fee, which means that the cost for a professional user under CTA could potentially be without limit depending on platform and system design.

billing process alignment,¹³ as well as policies around whether non-professional reporting is at the individual user or account level,¹⁴ which can result in double and triple billing for the same retail user that is reported multiple times on a per account basis.

Because of this complexity, retail brokers may rely upon alternative exchange products for quote and trade data, utilizing the SIPs only to meet the minimum requirements of Reg. NMS Rule 603(c).¹⁵ The alternative exchange top-of-book data products do not entail the levels of onboarding or administrative burden, nor the potential liability exposure created by varying interpretations and applications of the Nonprofessional subscriber policies.

From strictly a cost standpoint, the alternative exchange data products such as Nasdaq Basic or Cboe One, offer pricing that is unmatched by the SIPs for retail brokers with non-professional populations meeting or exceeding the current Enterprise License price¹⁶ caps for Tapes A, B, or C. Currently, Enterprise licensing for the 3 Tapes would cost a retail broker \$1,854,400¹⁷ a month in non-professional data costs alone. The current Tape Plan Enterprise rates exceed the \$50,000/mo or \$100,000/mo that a retail broker would pay for products like Cboe One or Nasdaq Basic respectively. Migration from the SIPs to an exchange proprietary solution would result in an effective savings at minimum of \$1,754,000 per month, or just over \$21,000,000 per year.

¹³ All billing by UTP is billed to the vendor who is directly supplying data to an end user regardless of designation of subscriber, whereas CTA requires that professional end users be billed directly, unless the vendor has signed an Exhibit C – For Indirect Vendor Billing Agreement and that each professional end user has signed a “Third Party Addendum,” all of which are reviewed annually through the Indirect Bill Audit Process which NYSE requires any firm accepting costs on behalf of their retail professional users to submit to. <https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/Policy-Indirect_Bill.pdf>.

¹⁴ UTP Policy specifically allows for nonprofessional account access to be shared between immediate family members. “In some instances, multiple individuals may have access to a single account. Vendors must separately report each Subscriber accessing the account (*unless the account is shared by immediate family members, such as husband and wife*).” Nonprofessional Guidance UTP Data Policies at 22 (published Oct 2018) (emphasis added) <<http://www.utpplan.com/DOC/Datapolicies.pdf>>. CTA policy however requires that each individual who has access to the account via a trading authorization or a power of attorney, even if a spouse, be reported and counted as an additional fee-liable subscriber in the monthly usage reporting regardless of whether they are already being reported under another account for the same billing month.

¹⁵ See Rel. No. 34-51808 (June 9, 2005), 70 FR 37496 at 37569 (June 29, 2005) (Reg. NMS Adopting Release). Rule 603(c) requires broker-dealers to provide a consolidated display for NMS stocks “in a context in which a trading or order routing decision can be implemented.” As such, a broker could provide non-consolidated data to investors, but comply with Rule 603(b) by displaying consolidated data at the time an investor places a trade.

¹⁶ See <<https://www.nyse.com/publicdocs/ctaplan/notifications/trader-update/Schedule%20Of%20Market%20Data%20Charges%20-%20January%201,%202015.pdf>> at 4 n. 5; and <<http://www.utpplan.com/DOC/Datapolicies.pdf>> at 3.

¹⁷ Enterprise License Fees are as follows: Tape A (\$686,400/mo); Tape B (\$520,000/mo); and Tape C (\$648,000/mo) (as of Oct. 9, 2018).

When that cost reduction is coupled with the fact that the exchange indicative product licenses would allow a retail broker to eliminate the Tape Plan's onerous Subscriber qualification requirements by covering those users who would otherwise be deemed "Professional" a retail firm's consideration of indicative products in place of Tape Plan data is easily rationalized. Not only would migration to indicative products allow for the elimination of a difficult qualification process, but also would eliminate the differentiation between retail professionals and non-professionals, along with all of the associated audit risk and liability because of process misalignment or interpretation is also eliminated. This translates into millions of dollars in risk reduction annually for a retail broker. The elimination of the need to differentiate between retail investors would allow an investor to have a uniform and consistent experience regardless of account type as well as avoid the need for the investor to enter into complex end user agreements with CTA and UTP that can act as a barrier to access of real-time quotation data.

Classification Challenges: Nonprofessional versus Professional

In the beginning, the application of the initial definition of nonprofessional and subsequent qualification could be determined by a single "Yes/No" response to the simple question: "Do you use market data as part of your employment or occupation?" Since 1983, however, the interpretation and application of that definition has departed from the straightforward language of the initial Plan filings.

The current CTA/UTP Non-Professional Subscriber policies¹⁸ present individual investors with a series of steps to access real-time consolidated quote information. The qualification requirements for a "non-professional" under Plan Administration has created the need for retail brokers to build complex processes and systems to satisfy Plan qualification requirements. The individual investor experiences the impact of this complexity at account opening:

1. The investor must first ensure that the account type they opened is that of a "natural person." This means that the account may not be that of a Qualified Plan/401k/403b, estate, a sole proprietorship, partnership, corporation, or any other account type titled under the auspices of a legal entity.

Nonprofessional is defined within the CTA and UTP Nonprofessional Subscriber Policies as follows:

"Nonprofessional Subscriber" means any natural person who receives market data solely for his/her personal, non-business use and who is not a "Securities Professional." A "Securities Professional" includes an individual who, if working in the United States, is:

- (a) registered or qualified with the Securities and Exchange Commission (the "SEC"), the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association.

¹⁸ <<https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/Policy%20-%20Non-Professional%20Subscribers%20-%20CTA.pdf>>; and <<http://www.utpplan.com/DOC/Datapolicies.pdf>>.

- (b) engaged as an “investment advisor” as that term is defined in Section 202(a)(11) of the Investment Advisor’s Act of 1940 (whether or not registered or qualified under that Act), or
 - (c) employed by a bank or other organization exempt from registration under Federal and/or state securities laws to perform functions that would require him or her to be so registered or qualified if he or she were to perform such functions for an organization not so exempt.
2. The sole exception to the “natural person” requirement outlined above permits an account titled in the name of a personal trust with four or fewer trustees to be deemed “NonProfessional” if all other requirements are met.
3. If the investor opens an account type as a “natural person,” a term not explicitly defined anywhere within the policies of either Plan, they are then required to complete what is known as an Exhibit B¹⁹ in order to “qualify” as a “Nonprofessional Subscriber.” This requires an investor to provide a list of all of their occupations, the name(s) and address(es) of their employer(s), their title and/or position at those employers, as well as a summary description of functions for each of the listed positions. This prerequisite data is then followed by eleven²⁰ “Yes/No” questions provided by the Plans, in order to “facilitate” a decision as to whether the investor qualifies as a “Nonprofessional Subscriber.”

A. Do you use Market Data solely for your personal, non-business use?

Yes No

B. Do you receive Market Data for your business or any other entity?

Yes No

C. Are you currently registered or qualified with the SEC or the CFTC?

Yes No

D. Are you currently registered or qualified with any securities agency, any securities exchange, association or regulatory body, or any commodities or futures contract market, association or regulatory body, in the United States or elsewhere?

Yes No

E. Whether you are located within or outside of the United States, do you perform any functions that are similar to those that require an individual to register or qualify with the SEC, the CFTC, any other securities agency or regulatory body, any securities exchange or association, or any commodities or futures contract market, association or regulatory body?

¹⁹ <https://www.nyse.com/publicdocs/ctaplan/notifications/trader-update/Exhibit_B_Metered_Usage_Addendum_and_Non-Professional_Subscriber_Electronic.pdf>.

²⁰ The policies of the Plans allow for consolidation of these eleven questions into a lesser number with prior approval so long as the specific intent of each of the eleven questions is retained to the satisfaction of the Plans.

Yes No

F. Are you engaged to provide investment advice to any individual or entity?

Yes No

G. Are you engaged as an asset manager?

Yes No

H. Do you use the capital of any other individual or entity in the conduct of your trading?

Yes No

I. Do you conduct trading for the benefit of a corporation, partnership, or other entity?

Yes No

J. Have you entered into any agreement to share the profit of your trading activities or receive compensation for your trading activities?

Yes No

K. Are you receiving office space, and equipment or other benefits in exchange for your trading or work as a financial consultant to any person, firm or business entity?

Yes No

In the event a retail investor provides an affirmative response to any of the questions beyond the first inquiring as to whether the data is for Personal Use,²¹ they do not “qualify” as a Nonprofessional Subscriber and must then be reported to the Plan Administrator as a Professional if they are provided access to real-time consolidated data. This is true even in cases where the retail user is simply using the proceeds from their small business to invest through a self-directed brokerage account. The standard has morphed from “use of market data within your occupation” to a standard where a retail user is considered a Professional if they are investing funds which are derived from commercial activity in an account that is not titled in an individual’s name resulting in the small business owner being treated just the same as if they held a Series 7 registration working on the trading desk of a Wall Street broker.

4. Once the investor has provided the employment information and responses to the Plan required questions, the investor is then required to attest to a six-page document that includes contractual terms and the above referenced questions known as the Exhibit B. The user may physically or electronically sign the agreement after reviewing the entire document. If the document is presented electronically, it must be implemented in such a way that requires that the entire document be reviewed before allowing the user to accept the terms. The retail broker is then required to retain a copy of this document and associated information for each user, with the ability to produce it on demand for a period of three years following the closure of a client’s account or the cessation of the receipt of data.

²¹ Whether data use is “Personal” in nature is undefined, and has been interpreted by the Plans to mean that the use of the account for the proceeds of commercial activity, even when that activity is not market related, is considered “Business Use.”

5. Upon receipt of a completed Exhibit B, the broker is then required to not just retain a physical or electronic copy of the Exhibit B, but to also then validate for accuracy, all of the information provided by the investor. This validation process requires not just that all of the free form information provided by the client be reviewed for clearly erroneous information, but that the information itself is validated for accuracy. In years past, this typically meant that a broker would validate that a Nonprofessional Subscriber does not hold an active FINRA Registration.²² The expectation of the level of diligence required of the brokers from the Plans, however, is growing in scope to extend beyond just confirming through FINRA BrokerCheck and the Commission's Investment Adviser Public Disclosure database that an investor is not currently registered with a broker or adviser, to also require brokers perform extensive due diligence to check unverified sources such as LinkedIn, Twitter, other social media sites, as well as anything accessible through Google, and defer to any information which contradicts that provided by the investor, and possibly disqualify the user from a non-professional designation.

The above process, which may rival any background investigation that a potential employer might seek to conduct before hiring a key employee, must be completed by retail brokers for each and every Nonprofessional subscriber before they are provided access to SIP consolidated real-time data.

Should any of the information provided by the retail investor fail to be sufficiently dispositive to the satisfaction of whomever from the Plans is reviewing, the investor will then be faced with the choice of either losing access to the real-time consolidated data, or paying significant on-going monthly fees²³ to retain access as a "Professional Subscriber." Not only is the investor negatively affected, but the retail broker that failed to qualify the user to the satisfaction of the Plan may be assessed a retroactive bill for the previous 36 months of Professional data costs for the user.²⁴

Even when all commercially reasonable efforts have been taken by retail brokers to validate the veracity of the information provided by the retail investor, such policy application and interpretation by the Plans creates significant potential liabilities for the retail broker.

To mitigate these potential liabilities, a cottage industry of firms offering products that utilize machine learning to search the web attempting to validate the Nonprofessional demographic information provided in the Exhibit B has risen. Major exchanges, and potentially the Plans themselves,

²² <<https://brokercheck.finra.org/>>.

²³ Currently, a retail subscriber with a professional designation would incur monthly fees of \$45 for Tape A, \$23 for Tape B, and \$24 for Tape C, a total of \$92/mo per retail professional subscriber to access real-time consolidated data from all 3 Tapes. A majority of retail professional users incur these fees directly, billed to them either directly by NYSE or via a pass-through by their broker. A retail subscriber with a non-professional designation would incur a cost of \$1/mo per Tape for a total of \$3 that due to the minimal cost, the majority of retail brokers absorb on behalf of the investor, providing nonprofessionals' access to real-time consolidated quote data at no cost to the investor.

²⁴ Current CTA and UTP terms are inequitable such that the Plans can seek redress for the last 36 months for errors in their favor, yet a broker may only claim credits going back 90 days.

are now subscribing or purchasing these tools for their own use to conduct these reviews.²⁵ This is completely at odds with the original vision and intent of the distinction between Professional and Nonprofessional designations and does not serve the retail investors in any way.

While the use of such tools and the underlying access to retail investor personally identifiable information raise privacy and security concerns, their use by exchanges in an audit capacity virtually assures that a retail broker also will license such services, at great cost to themselves and the investors they serve.

The question ultimately becomes at what point does a retail broker move away from the NMS Plans in favor of alternative top-of-book data products that provide for a fixed license cost significantly less than that of the SIPs and also allows for a retail broker to avoid the negative on-boarding investor experience, administrative overhead, and the risk liability that currently exists under the Plans.

The ability to offer retail investors an efficient way to establish an account and interact real-time with equity markets with minimal impediment is a compelling public policy goal, but one which is becoming increasingly difficult to attain under the policies of the Plans. Barring significant changes to Plan policies that reduce impediments to individual investor data access, overall costs, and administrative requirements, retail brokers will continue to evaluate moving away from making SIP consolidated real-time data generally available to all investors accessing their platforms.

SIP Plan Transparency and Governance

TD Ameritrade also supports greater transparency and governance improvements involving the CTA/UTP Plans. TD Ameritrade is encouraged by recent improvements to transparency such as the Plans providing trade and quote revenue and market data revenue percentages by fee type. Determinations of whether fees are “fair and reasonable,” however, cannot be made on a product or offering without a thorough understanding of both its revenue and costs. Greater transparency, and a meaningful economic analysis, therefore, is needed regarding the costs to operate the SIPs. TD Ameritrade also believes that meaningful governance of the Plans cannot be accomplished unless user and vendor representatives have a true voice in their operation. The governance structure should allow for fair and equitable voting rights for exchanges and for members of the CTA/UTP Advisory Committee.

* * * *

²⁵ Prosparency’s Know Your Subscriber (KYS™) Solution Selected by ICE Data Services, <https://prosparency.com/news/ice_press_release.pdf>.

Conclusion

TD Ameritrade appreciates the opportunity to comment on and participate in the Market Data Roundtable. The Firm strongly supports the reformation of market data structure. TD Ameritrade believes that the Commission could significantly improve retail investors access to market data by requiring Plans to simplify the process by which retail investors access consolidated data, and by eliminating Plan administrative burdens of enforcing complicated and inconsistent policies related to the provision of consolidated data.

Please feel free to contact me at [REDACTED] regarding any questions about these comments.

Respectfully Submitted,

/s/

Matthew J. Billings
Managing Director, Market Data Strategy